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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-552

PHILADELPHIA NEWSPAPER PRINTING PRESSMEN'S UNION LOCAL NO. 16, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

AND

BULLETIN COMPANY, *Respondents*

Petition for a Writ of Certiorari to The United States Court of Appeals For the Third Circuit

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v.

NATIONAL LABOR RELATIONS BOARD

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BULLETIN COMPANY, *Respondents*

Petition for a Writ of Certiorari to The United States Court of Appeals For the Third Circuit

Petitioner, the Philadelphia Newspaper Printing Pressmen's Union Local No. 16, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on July 22, 1971, Petition for Rehearing denied on July 27, 1971, in National Labor Relations Board v. Bulletin Company and Philadelphia Newspaper Printing Pressmen's Union Local No. 16.

OPINIONS BELOW

The opinion of the Court of Appeals, which has been reported and appears at 443 F.2d 863 (1971), is reprinted in the Appendix A, Pages (20)-(26) infra. The decision and order of the National Labor Relations Board, which has been reported and appears at 181 NLRB No. 95, 77 LRRM 2599, is reprinted in the Appendix B, Pages (27)-(30) infra.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1971. A Petition for Rehearing, timely filed by the Philadelphia Printing Pressmen's Union Local No. 16, was denied on July 27, 1971. A certified judgment was issued by the Court of Appeals in lieu of a formal mandate on August 25, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Should not the National Labor Relations Board and the Court of Appeals explore and define the motivation behind the conduct of the Union before determining whether or not the Union is guilty of an alleged unfair labor practice under Section 8b (2) and 1(a) of the Labor Management Relations Act?

2. Was not the purpose and motivation of the conduct allegedly attributed to the Union, the protection of the integrity of the bargaining unit and earning opportunities, objects not prohibited by the Labor Management Relations Act of 1947, as amended, and not violative of Section 8(a)(3) and 8(b)(2) and 1(a) of said Act?

3. Can the Union be held responsible for the acts of certain employees which are unsolicited and in direct contradiction of the official and public position of the Union that it would take no action against the Employer?

4. Does the Record in this case warrant holding the Union primarily liable where the Employer made little or no effort to alleviate the problems complained of or to support the aggrieved employees?

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.):

Section 8(a)(1)

Section 8(a)(3)

Section 8(b) 1(a)

Section 8(b)2

These sections are reprinted in pertinent part in Appendix C, page (31), infra.

STATEMENT OF THE CASE

This action was initiated when Richard A. Cummings, the Individual Charging Party, filed unfair labor practice charges against both the Bulletin and the Union on February 14, 1969, as a result of his being denied employment, by the Philadelphia Bulletin.

Thereafter, on April 30, 1969, a settlement agreement was entered into by the Bulletin under which it was agreed that the Individual Charging Party and certain other employment applicants would be put to work some time the following month. As the result of certain alleged production problems in the pressroom of the Employer, however, the Employer rescinded its agreement, and so notified the Regional Office of the National Labor Relations Board and filed its own unfair labor practice charges against the Union.

The Regional Director then issued a consolidated complaint in this matter, and subsequently petitioned the United States District Court for the Eastern District of Pennsylvania for an injunction against the Company and Union.[1]

Subsequently, a hearing was held on the petition for the injunction and an agreement was entered into by the parties therein, whereby these eight employees were thereafter placed on a job at the Bulletin Pressroom. After they began work, however, some untoward accidents and other incidents caused by certain unidentified people in the Pressroom area led the Bulletin to remove the Charging Party and the others who had taken the jobs from their employment status.

As a result of the unfair labor practice charges filed by

[1]On August 19, 1969, at a scheduled hearing on the injunction before the Federal District Court, the Union reiterated its decision that the question of whether or not the Individual Charging Party and the seven others similarly situated, who had formerly been employed at the Curtis Publishing Company, should be placed on the job, was a question to be resolved solely and entirely by the Employer and that the Union would not and had not taken any action to impede the making of this decision.

Mr. Cummings and by the Bulletin Company against the Union, and the consolidated complaint issued in this Matter by the Regional Director, hearings were held before a Trial Examiner for the NLRB who concluded that the Employer had discriminated in regard to the hiring and employment of the aggrieved persons, thereby encouraging membership in the Union, therefore, engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act. In addition, he found that the Union had caused the Employer to discriminate against these persons, and had, therefore, engaged in unfair labor practices within the meaning of 8(b)(2) and 8(b)(1)A of the Act. The Trial Examiner also found that the Employer and the Union had been maintaining and enforcing an agreement which conditioned the employment of journeymen and pressmen upon membership in the Union, and as a result they were in violation of the above Sections of the Act. The Examiner's recommended Order included, not only the customary cease and desist, but also a direction that the Parties be jointly liable for any back pay which may have accrued. On Appeal to the Board, the Trial Examiner's decision was affirmed, the Board relying principally on the finding that the Employer and Union maintained an agreement or understanding which conditioned employment by the Employer on Union membership, and that they denied employment to eight individual applicants because they lacked such membership, in violation of the Act. In addition, the Board revised the back-pay portion of the Trial Examiner's recommended remedy, the Board assessing the back-pay liability primarily against the Union, and secondarily against the Employer.

The matter came before the United States Court of Appeals for the Third Circuit on the application of the National Labor Relations Board to enforce the Order of the Board pursuant to Section 10(E) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.), and on the Cross-Petition of the Union under Section 10(F) of the Act to review the Order of the Board and to set said Order aside. The Court granted

enforcement of the Board's Order with the modification that the Board should direct the Union and the Employer to post their respective notices as required by the Board simultaneously. The Court based its decision upon a finding that the Union had committed acts or had allowed acts to be committed which had caused the Employer to terminate the employment of the eight former Curtis employees, without ever examining or considering the Union's position as to its motivation and purpose for the alleged illegal acts.

The Union submitted a timely Petition for Rehearing which was denied by the Court on July 27, 1971.

REASONS FOR GRANTING THE WRIT

A. The failure of the Court of Appeals of the Third Circuit to review or determine the Union's motivation for its actions which are alleged violations of the National Labor Relations Act, is in direct conflict with the guidlines for determining Section 8(a)(3) and 8(b)(2) violations of the Act set forth by the Courts of Appeals of other Circuits, by the United States Supreme Court, and by prior decisions of the National Labor Relations Board.[2]

Since this Court decided the *Radio Officer's Union v. NLRB* case, and its companion cases, subsequent case law has clearly established the proposition that not all methods and types of encouragement or discouragement of membership in labor organizations are violative of Section 8(a)(3) and 8(b)(2) of the National Labor Relations Act.[3] 347 U.S. 17, 74 S.Ct. 323 (1954). Although the Courts recognized certain exceptions, it became increasingly apparent that in most cases a finding of a violation of Sec. 8(a)(3) or 8(b)(2) required an affirmative showing of

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[2]It must be pointed out immediately, that it is for the purpose of this writ alone that the Union accepts the burden that it was allegedly responsible for the conduct which has been held to violate the Act. It has been the position of the Union throughout these proceedings that it has not committed any of the acts nor was it responsible in any way for the acts complained of by the "Charging Parties," the Bulletin Co. and by the NLRB. The record clearly establishes that the alleged offensive acts were committed by an unidentified "motor cycle gang" present on the Employer's premises. There is not one scintilla of evidence to connect these individuals with the Union, nor that the Union solicited, encouraged or condoned their conduct. Nothing is more clear from the record than that there is not any basis upon which an agency relationship could be established, so that Union responsibility for their acts could not be properly found in any possible way under the law.

[3]Refer to Appendix "C," page 31.

motivation behind the encouraging or discouraging union status or activity. These decisions are based on a recognition of the fact that the Act has not sought by these sections to prevent the employer and the Union from making certain decisions, calculated to further the welfare of all employees, which may as a foreseeable result of the decision encourage union membership. *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. National Labor Relations Board*, 365 U.S. 667, 81 S.Ct. 835 (1961). See also *National Woodwork Manufacturers Association et al. v. National Labor Relations Board*, 386 U.S. 612, 87 S.Ct. 1250 (1967). The Supreme Court has found it necessary to balance the statutory goals of Section 8 of the NLRA with the legitimate business purposes of employer and union alike and the freedom of employees from restraint or coercion in their exercise of the rights granted them by the Act. *Local 357 v. NLRB*, supra; *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456 (1951).

The United States Circuit Courts have followed the Supreme Court guidelines and in most cases, have attempted, in their review of decisions and Orders of the National Labor Relations Board, to treat these alleged violations of Section 8(a)(3) and 8(b)(2) on a case by case basis with efforts at determining the employer and union motivation for the acts which were supposed to have discriminately encouraged union membership. Even in light of the obvious difficulties of making such a determination and in properly balancing proper employer and union objectives with employee rights, a review of the decisions of the Courts of Appeals of the different Circuits indicates that most have made efforts in each case to explore and determine the motivational factors and balance them with their interpretation of the statutory requirements.

As an example, the Second Circuit in *NLRB v. Miranda Fuel Co.*, 326 F. 2d 172 (1963), gave an in-depth

review of the guidelines to be used in finding whether employer actions allegedly provoked by the union constituted an unfair labor practice under Section 8.

The Court rejected the theory of the National Labor Relations Board that any sort of discrimination, unfairness or injustice to an employee by the Union and acquiesced in by the Employer, constituted a breach by the Union of the fiduciary duty implicit in Section 9 of the Act to represent employees fairly, and an unfair labor practice by both the Union and the employer under Sections 8(a)(3), 8(a)(1), 8(b)(2), and 8(b)(1)(A). They held, relying on the decision of the Supreme Court in *Local 357, International Brotherhood of Teamsters v. NLRB*, supra, that it was not the intent of Congress to read into Section 7 and Section 8 of the Act the duty of fair representation implicit in Section 9. Such a theory, the Court said, would ignore the real reasons and motives behind the complained of acts, finding violations in every case.

Accepting the universal truth that practically everything a union does (if done properly) encourages union membership, the Second Circuit decided that it was not enough to show that the employer discriminated among employees at the behest of the Union but that it was necessary to show that the acts complained of were done with the unlawful intent and purpose of encouraging employees to join the union. *NLRB v. Miranda Fuel Co.*, supra. See also *Lawrence F. Cafero v. National Labor Relations Board*, 2nd Cir., 336 F. 2d 115 (1964); *National Labor Relations Board v. Local 294, International Brotherhood of Teamsters*, 2nd Cir., 317 F. 2d 746 (1963).[4]

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[4]For decisions in other Circuits recognizing the necessity of examining motivation see:

National Labor Relations Board v. Houston Chronicle Publishing Company, 5th Circ., 211 F.2d 848 (1959);

National Labor Relations Board v. International Union of Operating Engineers, Little Rock, Local 382 & 382A, AFL-CIO, 8th Cir., 279 F.2d 951 (1960).

In addition to most of the United States Circuit Courts, the NLRB has adhered to the Supreme Court guidelines in its decisions concerning Section 8 violations. The Board has recognized that there are legitimate business and employment considerations which justified actions which might adversely affect an employee's status even if encouragement or discouragement of union membership was an indirect result.

In its decision in the *Los Angeles Paper Handlers' Union* case, a situation involving a publisher and printing union as we have in the case at bar, the Board held that "to bring the Respondent Union's conduct within the proscription of 8(b)(2) the General Counsel must show by relevant evidence that the Respondent Union's motive for the derogation (of the employee's status) was to encourage or discourage union membership." *Los Angeles Paper Handlers' Union No. 3, Subordinate to the International Printing Pressmen's and Assistants' Union of North America, AFL-CIO,* 181 NLRB No. 70 (1970), 73 LRRM 1418.

The Board then, it would seem, has realized the necessity of establishing the motivational factors in determining whether an unfair labor practice actually exists. It has upheld the right of the Union to attempt to affect the employment status of an individual if it is clear that its purpose is to better serve the unit it represents, even though some encouragement of union membership occurs. Such considerations and acts are lawful and will not be held to be unfair labor practices in violation of the Act. *Los Angeles Paper Handlers' Union,* supra; *Houston Typographical Union No. 87, International Typographical Union AFL-CIO and Rodney James Missman and Houston Chronicle Publishing Co., et al.,* 145 NLRB No. 153, (1964), 55 LRRM 1190; *International Typographical Union,*

Lummus Co. v. National Labor Relations Board v. Local 80 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, District of Columbia, Circ., 339 F.2d 728 (1964).

Columbus Typographical Union No. 5 AFL-CIO, The Dispatch Printing Co. and Maryane Grubb, 77 NLRB No. 58, (1969), 71 LRRM 1406.

It would appear, however, particularly in its decision in this case that the Court of Appeals for the Third Circuit has elected to disregard the importance of the motivational factors in Section 8 violation cases and the fact that such factors can justify the employer and union actions complained of.

A review of the Court's Opinion in the case at bar clearly shows an acceptance of the decision of the National Labor Relations Board without either the Court or the Board reviewing or questioning the motivation of the parties. Sole reliance on finding a violation of the Act is based on a determination that the Union caused the Employer to discriminate against the eight aggrieved employees by firing them and an alleged informal agreement between the Union and Employer, which conditions employment upon membership in, or clearance or approval by the Union, both encouraging Union membership and, therefore, violative of Section 8.

The Third Circuit has itself recognized that a referral system for employment is not a per se violation of the Act. *National Labor Relations Board v. Local 542 International Union of Operating Engineers*, 3rd Cir., 255 F. 2d 703, (1958); *National Labor Relations Board v. Philadelphia Iron Works*, 3rd Cir., 211 F. 2d 937 (1954). Because of that, the Court must make a determination of whether the operation of the system and the acts which stem from its operation were designed exclusively for the encouraging or discouraging of Union membership or activities. By failing to consider or even discuss the motivational factors which the Union put forth, the Court of Appeals for the Third Circuit was in direct conflict with the decisions of the Supreme Court of the United States and with those of the Courts of Appeals of other Circuits, and for that reason justifies the grant of Certiorari to review its judgment. *Local 357, International Brotherhood of*

Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB, supra; *NLRB v. Miranda Fuel Co.*, supra.

B. The decision below raises significant and recurring problems concerning the ability to determine whether union activities are proper union functions or unfair labor practices under the National Labor Relations Act.

The problem of determining what union activities can be considered proper within the scope of Section 8 of the National Labor Relations Act is an obviously difficult area with tremendous inplications. It is clear that the intent of Congress in adding these sections to the NLRA was to protect guaranteed employee rights and freedoms by limiting the acts and pressures which union and employer could utilize to infringe upon these protected areas for their own benefits. It is equally clear, however, that the Congress did not intend to emasculate the union movement or deny employers the right to a freedom of choice in the making of legitimate business decisions.

The Courts have firmly established that not all acts by unions or employers which adversely affect employees are unfair labor practices under Section 8. If the acts were not discriminatory, with the sole purpose of encouraging union membership, and if they can be shown to have been based on legitimate business and union purposes, then they should not be interfered with. *Local 357, International Brotherhood of Teamsters v. NLRB*, supra; *NLRB v. Miranda Fuel Co.*, supra.

Since the activities in these protected areas must be balanced, one against the other, it is quite obvious that judicial guidelines must be made available to the parties involved to enable them to continue to exist and function effectively. Where, as the Court of Appeals for the 3rd Circuit has done in this case, the approach is taken that any union and employer practice which encourages union

activity and membership is a per se violation of the Act, not only has the Court disregarded the true state of the law, but it has created an impossible situation for the successful interaction of labor and industry within its jurisdiction.

It can readily be seen that if the Court of Appeals for a particular Circuit, as the enforcement body of the National Labor Relations Board, refuses to recognize the strong case precedent holding that proper motivation can justify certain acts which without that motivation might be considered unfair labor practices, labor relations in that area could quickly reach an impossible state. And if that same Court would, as a result of such a stand, fail to establish the necessary guidelines by which labor and industry could determine what they could and could not do to further their own interests, then in all probability any interrelationship between union and employer would be an impossibility.

The furtherance of the interrelationship between employers and labor organizations on one hand and the interrelationship between labor organizations and union and non-union employees on the other is the basic purpose of the National Labor Relations Act. To allow the decision of the Court of Appeals in this case (which is in direct conflict with the guidelines established by other Court precedents for the advancement of labor relations) to stand would be a direct threat to the continued success of that purpose. *NLRB v. Miranda Fuel Co.*, supra.

To do away with the possibility of justification based on proper motivation as the lower court has attempted to do here, would add unconscionable dimensions to the power of the National Labor Relations Board in their application and interpretation of the unfair labor practices portion of the Act. Such a possibility needs the attention and thorough re-examination of this Court so that all potentially affected parties in this and all other jurisdictions may properly gauge what activities are legiti-

mate and illegitimate under Section 8 of the National Labor Relations Act.

In the final analysis, too, the decision below is clearly erroneous. The evidence in this case plainly demonstrates that the parties were not engaged in maintaining or enforcing an agreement which conditioned the hire or employment of pressmen upon membership in or clearance by the Union.

The mere fact alone that much of the hiring for the company is done through foremen, who in turn are union members, does not give rise to any presumption that they will exercise their managerial authority to hire in an unlawful manner. *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961). The evidence here does not support such a presumption. One of the essential elements, that of an illegal exclusive hiring agreement, required for finding violations of Section 8(a)(3) and 8(b)(2) of the Act is, therefore, missing.

Also, the record does not support the finding of the Board that the Union was responsible for the discharge of the charging parties. While it is true that the Union objected to the employment of these men because they had not served an apprenticeship, its position was clearly that if the men were capable of doing the job, then they could have the job, and although it would endanger the position of the apprenticeship training program, the union would take no steps to interfere with their employment or to require the Bulletin not to employ them. Such a position is not violative of the Act. The record shows that the Union in no way took any action, caused or was involved in the problems that led to the Employer's discharging of the aggrieved employees. On the contrary, the only thing that the record does show is that the employer failed to live up to its obligations in policing its place of work and its work force.

Primarily, however, the evidence overwhelmingly indicates that the union position throughout, was based on

a goal of preserving work standards and work opportunities for the unit it represented. Since its position was in no way related to whether or not the individuals in question had obtained prior membership in or clearance from their Local, a holding that the Union has violated any of the provisions of the Act is totally improper. And even if union liability could be found, the Court below erred in holding the Union primarily responsible when the Employer made absolutely no effort to control its own plant and work force to initiate the hiring decisions it had made.

The total lack of evidence of illegal hiring practices, of union and employer discrimination based on the lack of union membership or clearance, and of illegal union motivation makes the decision of the Third Circuit totally unjustified.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX A

OPINION OF THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

(Filed June 11, 1971)

No. 19058

ROSENN, *Circuit Judge*.

The National Labor Relations Board has found that the Bulletin Company ("Bulletin") and Philadelphia Newspaper Printing Pressmen's Union Local No. 16 ("Union") violated Section 8(a)(1) & (3) and Section 8(b)(1) & (2), respectively, of the National Labor Relations Act, as amended,[1] by discriminating in regard to hire and tenure of eight persons formerly employed by Curtis Publishing Company, and by maintaining, enforcing and giving effect to an agreement which conditions employment upon membership in or clearance or approval by the Union. The Board has applied to this court pursuant to Section 10(e) of the Act for enforcement of its order issued on March 11, 1970 against the Bulletin and the Union. The Board's decision and order are reported at 181 NLRB No. 95.

The Trial Examiner, after a number of hearings, found and concluded that the respondents maintained a discriminatory practice which required Union membership and approval as a condition for employment, and that the Union had caused the Bulletin to discharge the eight former Curtis employees because the Union had not initially approved or referred them to the Bulletin for employment. The able and thorough decision of the Trial Examiner recited the detailed facts and extensive background of this case and makes it unnecessary for us to repeat them.

1. 61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.

The Board reviewed the entire record, including the Trial Examiner's decision, and adopted his findings of fact and conclusions of law. The Board, however, modified the Trial Examiner's recommended order pertaining to the payment of back pay. The Board's order requires the parties to cease and desist from the unfair labor practices found, and from in any other manner restraining, coercing or interfering with employees in the exercise of their rights under the Act. Affirmatively, the order requires the Bulletin to offer the eight named persons immediate employment as journeymen pressmen. It also requires that the Union notify the Bulletin in writing that it withdraws all objection to the hiring of these individuals and requests the Bulletin to offer them immediate employment as journeymen pressmen. Both the Union and the Bulletin are required to post appropriate notices and, finally, the order requires both defendants, with the Union primarily liable,[2] to make the eight persons whole for any loss of earnings suffered as a result of the discrimination.

The Bulletin takes no issue in this appeal with the decision and order of the Board but seeks only to have the court require that the notices provided in the Board's order be posted simultaneously by both the Union and itself. It seeks this relief in order to forestall a recurrence of the acts of slowdown, sabotage and harassment which occurred when it previously attempted to comply with the terms of a settlement agreement effectuated by the Board.[3] The

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2. The Board's decision was predicated upon its conclusion that the Bulletin had taken "all reasonable measures required to overcome the Union's opposition to the hiring of the eight applicants, and that the primary burden for restoring the wage losses resulting from the discrimination rightfully falls on the Union."

3. One of the eight men denied employment, Cummings, filed an unfair labor practice charge with the Board against the Union and the Bulletin on February 17, 1969. On April 30, 1969, the Bulletin and the Board entered into a settlement agreement, approved by the Regional Director of the Board, in which the Bulletin agreed to offer employment as journeymen pressmen to the eight named former employees of Curtis and to post appropriate notice.

Union seeks to set aside the order of the Board on the grounds that it is not supported by "substantial evidence" and, that if liability is imposed on the Union, it should not be held primarily liable to the aggrieved employees.

The function of this court is to ascertain whether or not, on a consideration of the record as a whole, the findings of fact are supported by "substantial evidence." *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). We have carefully examined the entire record and we are fully convinced that the findings of fact of the Trial Examiner, as well as the conclusions of law, are amply supported by the evidence. As to the question of liability, in view of the extended effort by the Bulletin to overcome the Union's adamant opposition to the hiring of the eight experienced journeymen, the modification in the remedy by the Board which made the Union primarily liable for the back pay of the employee victims of the discrimination was just and warranted. It follows the remedy fashioned by this court in *NLRB v. Lexington Electric Products Co.*, 283 F.2d 54, 57 (3d Cir. 1960), cert. den. 365 U.S. 845 (1961), where

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Pursuant to the agreement, the Bulletin offered employment to the eight former Curtis employees, informed the pressroom foremen (who were also members of the Union) of the terms and significance of the settlement agreement, and advised one of the Union's local plant officials that the notices required by the settlement agreement would be posted. The notices were posted in the afternoon of May 20, 1969. The following day the Bulletin experienced certain production problems. These grew worse and on May 22 production had fallen to about two-thirds normal. Some of the problems were due to sabotage caused by the throwing of electrical switches to improper positions, improper operation of reels, and damage to the photo-electrical cells which control the movement of reels, all of which caused breaks in the paper rolls which were threaded through the presses. Because of the production slowdown and sabotage of machinery, the Bulletin removed the notices of intent to hire the Curtis employees on May 22, 1969, and instructed them not to report to work. Reilly, the Union business manager who on May 22nd professed ignorance of any problems at the Bulletin, stated at that time that if the Bulletin did have a problem, the removal of the notice would resolve it.

we also found it "patently inequitable that the employer be more than secondarily responsible for back pay."

We find no merit in the Union's contention that it bears no responsibility whatsoever for the incidents of sabotage, slowdown and harassment that occurred in May, 1969, when the Bulletin posted notice, as it was required to do by the National Labor Relations Board, of its intention to hire the eight former Curtis employees, or for those incidents which again recurred in late August when the employees were hired.[4] There was sufficient evidence to

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4. On May 26, 1969, the Bulletin had notified the Board that it could not comply with the terms of the settlement agreement of April 30, 1969, because of the conduct of the Union members (footnote 2, supra). On June 12 the Regional Director withdrew his approval of the agreement and on June 13 he filed a consolidated complaint in the matter. After the complaint was issued, application was made to the U.S. District Court for the Eastern District of Pennsylvania for an injunction against the Company and the Union, pursuant to Section 10(j) of the Act. On August 19 the Bulletin and the Union entered into an agreement before Judge C. William Kraft, Jr., under the terms of which the Bulletin agreed to offer employment to the eight former Curtis employees. The Union agreed that it would not conduct any work stoppages or slowdowns if any of the eight were hired.

Pursuant to the agreement, two of the Curtis people, Cummings and Roberts, began work at the Bulletin on August 27, 1969. They were immediately subjected to verbal and physical abuse by members of the Union, including profanity and threats of bodily harm. Their clothing and bodies were doused with ink, they were pelted with eggs and dangerously harassed by the Union pressroom employees who continually surrounded them. On September 2, 1969, two additional former Curtis employees began work and all four new employees found themselves subjected to continual harassment by Union members. Fearing for the safety of the employees, Elliott, the assistant business manager of the Bulletin, informed Reilly that anyone caught in the act of sabotage or harassment would be dismissed. Reilly replied that if anyone was dismissed there would be "trouble."

Following a series of "accidents" on September 3, in which equipment was damaged by a falling plate and employee lives were endangered, one of the new employees quit. On September 4, after continued harassment and ink drenchings, the remaining new

support the Trial Examiner's inferences that responsible officers of the Union were aware of what was occurring and that they at no time disavowed the misconduct or took any counteractive measures. The Trial Examiner was justified in finding that neither the Union business manager, nor the chapel chairman[5] "appear to have done anything to alleviate the situation and seem to have dragged their feet, at least until the employer capitulated." The Trial Examiner characterized as "disgraceful" the conditions caused by the concerted activities of the Union pressroom employees and under which the Curtis employees had to work in late August and early September. The record fully supports this characterization. Although the Union business manager issued instructions to the Union's members to honor the Union's commitment to the court and to engage in no slow-downs or stoppages when the Curtis men were hired, he also reminded the members that the Curtis men were "unqualified" in the Union's eyes and that the Union opposed their hire.[6] Previously, he had instructed the members to give no assistance to the new employees, and at a meeting in the pressroom, he repeated this instruction.

There was testimony that on at least one occasion, Mallon, the president of the Union, was present in the Bulletin pressroom with Reilly while Union members hurled physical objects as well as profanity at the new

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employees were sent home for their own protection and have not been since scheduled for work. On October 14, 1969, the District Court, Eastern District of Pennsylvania, granted a temporary injunction on behalf of the 4th Region of the National Labor Relations Board against the Bulletin and the Union pending final disposition of the matters before the Board regarding the alleged illegal hiring practices agreement between the Bulletin and Local No. 16. See *Samoff v. Philadelphia Newspaper Printing Pressman's Union, No. 16*, 304 F. Supp. 677 (1969).

5. A chapel chairman in the structure of this Union appears to perform the duties generally ascribed to a shop steward.

6. Under the existing labor contract, the Company was the "sole judge" of the competency of the men it hired.

employees. When the harassment and disorder began with the employment of the Curtis people in the pressroom, which the Union claimed to control, the Bulletin sought Reilly's help. Reilly blamed the employer for the conditions and predicted "trouble" if anyone were disciplined. The Union never disaffirmed nor repudiated through Reilly or any of its other officers the concerted acts of harassment or sabotage by its members. These activities were not unrelated, isolated acts or the reactions of strangers who found themselves assembled perchance in a group. They were committed by a body of men bound by a collective bargaining agreement and united by a common bond of membership in a highly structured and sophisticated labor organization. This Union had obligations[7] as well as emoluments and benefits under the terms of the contract with the Bulletin. Their consistent reactions to work by any of the Curtis employees in the Bulletin pressroom revealed a well defined pattern consonant with the Union's interests. This is particularly apparent when considered in the light of previous admonitions and declarations by Union officials to the Bulletin regarding the proposed hiring of the former Curtis employees.

When union officers knowingly stand passive in the face of flagrant misconduct by a body of their members calculated to force an employer into a violation of the law, without taking affirmative action to repudiate that misconduct, and when, as here, that passivity amounts to silent approbation, the Union may not escape liability by claiming the misconduct was that of its individual members and not of the Union itself. The pattern of misbehavior was also committed in total disregard of covenants nego-

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7. Union counsel's letter of August 20, 1969, to Reilly, business manager of Local 16 stated, inter alia:

> "In the meantime, however, we have both a contract no strike, no stoppage clause which must be adhered to and the impact of this clause is made greater by the fact that we have reiterated before Judge Kraft that we will abide by it."

tiated at the bargaining table[8] and a settlement agreement entered into in the court.[9] Although the Union officers knew of the difficulties caused by their members at the Bulletin plant and the underlying reasons for them, they made no effort to remedy the situation. On the contrary, they ignored the Bulletin's pleas for help. They embarked upon a course of inaction which amounted to an acquiescence in the activities and objective of their members. The evidence amply supports the Trial Examiner's finding and conclusion adopted by the Board that:

> "By at least permitting a situation which it had created to continue, the Union ratified and condoned, if it did not actually participate in, the members treatment of the new employees, and was therefore responsible for the employers termination of those employees."

Inasmuch as the order of the Board is directed to both respondents and each of them is required to immediately post notices upon receipt thereof from the Regional Director, the request of the Bulletin that the respondents be required to post their respective notices simultaneously does not appear to be unreasonable under the facts of this case. The Board shall direct the respondents to take such action simultaneously. A decree for enforcement of the order of the Board may be submitted.

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8. The Bulletin and the Union entered into a collective bargaining agreement for the term of May 1, 1968, to May 1, 1971. This agreement was supplemented by a letter agreement dated September 23, 1968.

9. See footnote 4, supra.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD. 181 NLRB No. 95

On November 19, 1969, Trial Examiner George J. Bott issued his Decision in the above-entitled proceeding, finding that Respondents had engaged in and were engaging certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondents filed exceptions to the Trial Examiner's Decision and briefs in support thereof. The General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in these cases, including the Trial Examiner's Decision, the exceptions and briefs, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations with the following modification:

The Trial Examiner found, and we agree, that the Respondent Company violated Section 8(a) (3) and (1) of the Act, and Respondent Union violated Section 8(b) (2) and (1) (A) of the Act by maintaining an agreement or understanding which conditioned employment in the Company on Union membership, clearance or approval, and by denying employment to eight individual applicants because they lacked such membership, clearance or approval. As part of the remedy, the Trial Examiner recommended that the Company be made "jointly and

severally" liable with the Union for the backpay accruing to the eight discriminatees. We find merit in the Company's exceptions to this recommendation.

The facts show that the Company made repeated attempts to persuade the Union that the ex-Curtis pressmen were qualified and that a negotiated solution was the preferable one. The Union responded with assertions of its "exclusive" control over hiring, warnings of "trouble," and the statement that the eight applicants would be hired only under a court order. Following a crippling slowdown in the pressroom (which upset a Board settlement agreement), the Company itself filed charges against the Union. And the Union persisted in its unlawful pressures against the hiring of the ex-Curtis employees. In light of the Union's intransigent attitude and the Company's vulnerability to union pressure,[1] we cannot say, for remedy purposes herein, that the Company should be faulted for not having done more than it did to resist the Union's coercive and discriminatory conduct. Rather, we are satisfied that, under the circumstances presented, the Company took all reasonable measures required to overcome the Union's opposition to the hiring of the eight applicants, and that the primary burden for restoring the wage losses resulting from the discrimination rightfully falls upon the Union. Accordingly, we shall make the Union primarily liable, and the Company only secondarily liable, for the backpay of the eight discriminatees. Our action here will not "water down" the remedy afforded the eight employees, since recourse against the Company will be available in the event reimbursement is not forthcoming from the

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[1]The Company was faced with a shortage of pressmen and was largely dependent on the Union to provide them. It also appears that a slowdown, such as that experienced on May 21 and 22, 1969, has a severely disruptive effect on Company operations. Given this situation, we cannot fault the Company for exhausting all avenues of persuasion and negotiation before filing its unfair labor practice charge.

Union. In short, we find that, on the facts presented, it will better effectuate the purposes of the Act to place primary responsibility for backpay liability on the Union.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that Respondent, Bulletin Company, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, and Philadelphia Newspaper Printing Pressmen's Union, Local No. 16, Philadelphia, Pennsylvania, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order, as modified herein:

1. Delete paragraph 2(a) of the Trial Examiner's Recommended Order against the Company (p. 24) and substitute the following:

(a) Offer to the persons named in the attached notices immediate employment as journeymen pressmen and, in conjunction with Respondent Union, with Respondent Union primarily liable, make them whole for any loss of earnings suffered as a result of the discrimination in manner and to the extent set forth in this Decision and in the "Remedy" section of the Trial Examiner's Decision.

2. Delete paragraph 2(b) of the Trial Examiner's Recommended Order against Respondent Union (p. 26) and substitute the following:

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[2]See *N.L.R.B. v. Lexington Electric Products Co.*, 283 F.2d 54, 57-58 (C.A. 3); *SuCrest Corp.*, 165 NLRB 596, enfd., 409 F.2d 765, 772 (C.A. 2); *Zoe Chemical Co., Inc.*, 160 NLRB 1001, 1002-1003, enforcement denied as to the employer, 406 F.2d 574 (C.A. 2). The factual differences cited by the Trial Examiner do not, in our opinion, render these cases inapposite.

(b) In conjunction with Respondent Employer, with Respondent Union primarily liable, make the person named in the attached notices whole for any loss of pay they may have suffered by reason of the discrimination against them, in the manner and to the extent set forth in this Decision and in the "Remedy" section of the Trial Examiner's Decision.

3. Delete the fifth indented paragraph of Appendix A to the Trial Examiner's Decision and substitute the following:

> WE WILL, in conjunction with the UNION, with the UNION primarily liable, make said employees whole for any loss of pay suffered as a result of the discrimination against them.

4. Delete the fourth indented paragraph of Appendex B to the Trial Examiner's Decision and substitute the following:

> WE WILL notify the BULLETIN COMPANY that we have no objection to the employment of EDWARD HENDERSON, RICHARD CUMMINGS, LEO COYLE, CHARLES SCHALLER, HAROLD HEYDT, ALBERT BOENING, FRANCIS ROBERTS, and GEORGE TROCK, and WE WILL, in conjunction with the above-named COMPANY, with ourselves primarily liable, make these employees whole for any loss in pay suffered as a result of the discrimination against them.

Dated, Washington, D. C., March 11, 1970.

/s/ Frank W. McCulloch, Chairman
/s/ Gerald A. Brown, Member
/s/ Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX C

STATUTORY PROVISIONS INVOLVED
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.):

Section 8:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(a)(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or

(B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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COUNTERSTATEMENT OF THE CASE.

In January 1969 a pressman applied for a position directly to the employment office of Bulletin Company (hereinafter referred to as the "Bulletin") the publisher of The Evening and Sunday Bulletin. It is the usual practice in the newspaper industry for a journeyman pressman looking for a position with a newspaper to apply through the local pressmen's union or go directly to the pressroom of the newspaper for which he is interested in working. Thus, it is rare for a pressman to apply directly at the employment office of a newspaper.

The application made by the pressman in January 1969 was the first time since June of 1966 that a pressman had applied directly to the Bulletin employment office.

When another pressman had applied directly to the Bulletin employment office in June 1966 there was a disastrous slowdown in the Bulletin pressroom resulting in the inability to deliver tens of thousands of papers that day. The then business manager of petitioner, Philadelphia Newspaper Printing Pressmen's Union Local No. 16 (hereinafter referred to as "Local 16" or "Union") made it clear that Local 16 opposed the Bulletin's right to hire directly journeymen pressmen who are not members of Local 16 and who have not completed the newspaper pressmen's apprenticeship course. This dispute resulted in Local 16 being placed under trusteeship by the International Union. During the trusteeship an agreement was reached whereby Local 16 would not oppose the hiring of pressmen who were not members of Local 16 and who had not completed the apprenticeship program.

In light of this background and in the interest of maintaining good union-management relations, the Bulletin contacted the business manager of Local 16 in January of 1969 to inform him of the Bulletin's intention to hire this press-

man-applicant. Local 16 took the position that there would be trouble if this applicant, and the other seven applicants who subsequently applied directly to the Bulletin, were hired.

On February 17, 1969, one of the applicants filed unfair labor practice charges with the National Labor Relations Board (hereinafter referred to as the "NLRB") against the Bulletin and Local 16. Upon the request of the NLRB's Regional Director, the Bulletin entered into a settlement agreement together with Local 16 wherein it was agreed that the Bulletin would hire the charging party and the seven other applicants.

When the Bulletin posted the NLRB settlement agreement notice a few days prior to the date on which these pressmen were scheduled for work, a slowdown began in the pressroom. The slowdown continued the following day and by mid-afternoon it became apparent that it would be impossible to deliver approximately 200,000 of that afternoon's newspapers. Failing to obtain the cooperation of Local 16 to end the slowdown, and faced with the imminent threat of being unable to deliver the afternoon papers, the Bulletin removed the settlement notice whereupon production immediately began to return to normal. The Bulletin notified the Regional Office of the NLRB that to get normal production it was necessary to rescind the settlement agreement. The Bulletin then filed unfair labor practice charges against Local 16.

The Regional Director of the NLRB issued a consolidated complaint and shortly thereafter petitioned the United States District Court for the Eastern District of Pennsylvania for a preliminary injunction against the Bulletin and Local 16.

At the hearing held on the petition for the injunction an agreement was entered into, approved by the court, whereby the Bulletin agreed to offer employment to the

eight applicants and Local 16 agreed not to interfere with the hiring of these men or cause any stoppages or slowdowns.

From the time the first two men reported for work pursuant to the settlement agreement in late August 1969 the Bulletin was faced with slowdowns and numerous acts of sabotage in the pressroom and constant harassment directed towards these two men. After almost a week of this extensive sabotage and harassment the Bulletin found it necessary to send the men home in order to protect their health and safety as well as the health and safety of others working in the pressroom.

Thereafter, a hearing was held in the district court on the NLRB's petition for an injunction and the court ordered the immediate hiring of the eight men and restrained Local 16 from interferring with their employment. All eight of the men were then offered employment by the Bulletin and five of them accepted employment in November 1969.

A hearing on the NLRB consolidated complaint was held before an NLRB Trial Examiner who issued his decision finding that the Bulletin and Local 16 violated, respectively, Sections 8(a)(3) and (1) and 8(b)(2) and (1)(A) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, et seq., (hereinafter referred to as the "Act")—the Bulletin by discriminating in regard to the hire and tenure of the eight applicants, Local 16 by causing the Bulletin to so discriminate, and both the Bulletin and Local 16 by maintaining in effect an agreement, understanding and practice which conditioned employment of pressmen with the Bulletin upon membership in, or clearance or approval by, Local 16.

The Trial Examiner recommended that the Bulletin and Local 16 cease and desist from the unfair labor practices, that the Bulletin offer to the eight applicants immediate employment as journeymen pressmen, that Local 16

notify the Bulletin in writing that it withdraws all objections to the employment of these eight applicants, that the Bulletin and Local 16 jointly and severally make the applicants whole for any loss of pay they may have suffered by reason of the discrimination against them, and that the Bulletin and Local 16 post designated notices.

Thereafter, both the Bulletin and Local 16 filed exceptions to the Trial Examiner's decision. The Bulletin took exception only to a portion of the remedy recommended by the Trial Examiner, it being the position of the Bulletin that it should only be secondarily, rather than jointly, liable with Local 16 for any backpay due the applicants.

The NLRB affirmed the Trial Examiner's rulings and adopted the Trial Examiner's findings, conclusions and recommendations with the modifications that the Bulletin be held only secondarily liable with Local 16 with respect to any backpay due the applicants.

The matter came before the United States Court of Appeals for the Third Circuit on application of the NLRB to enforce their order pursuant to Section 10(e) of the Act and on cross petition of Local 16 under Section 10(f) of the Act to review and set the order aside. In that appeal the Bulletin sought only to have the court require that the notices provided in the NLRB's order be posted simultaneously by Local 16 and the Bulletin, in order to forestall any recurrence of the acts of slowdown, sabotage and harassment which occurred when it previously attempted to comply with the terms of the settlement agreement. The court granted enforcement of the NLRB's order with the modification sought by the Bulletin: that the NLRB shall direct Local 16 and then Bulletin to post their respective notices simultaneously.

Local 16's petition for rehearing in the Third Circuit was denied by the court on July 27, 1971.

REPLY TO REASONS ADVANCED BY PETITIONER FOR GRANTING THE WRIT.

A. The Court of Appeals for the Third Circuit Did Review the Board's Determination of the Union's Motivation for Its Actions Which Were Found to Be Violations of the National Labor Relations Act.

The National Labor Relations Board found that the Bulletin and the Union violated Sections 8(a)(1) and (3) and Sections 8(b)(1) and (2) respectively of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, by discriminating in regard to hire and tenure of eight persons, not members of Local 16 who applied for employment directly to the Bulletin, and by maintaining, enforcing and giving effect to an agreement which conditioned employment of pressmen with the Bulletin upon membership in, or clearance or approval by, Local 16 (18 N.L.R.B. No. 95).

The Court of Appeals for the Third Circuit, after carefully examining the entire record held that "we are fully convinced that the findings of fact of the Trial Examiner, as well as the conclusions of law, are amply supported by the evidence." (443 F. 2d 863, 865 (1971))

The Trial Examiner, in his decision which was adopted by the Board with only slight modification, considered at length the justifications advanced by Local 16 for its conduct and concluded that it was Local 16's aim to maintain a closed-shop condition by discriminating against applicants on the basis of union consideration. (TXD-638-39 at 18-21) Clearly such activity violates Sections 8(b)(1) and (2) of the Act. *Radio Officers' Union v. NLRB*, 347 U. S. 17 (1954).

In support of its petition for a writ of certiorari Local 16 relies extensively upon the second circuit decision in

NLRB v. Miranda Fuel Co., 326 F. 2d 172 (2d Cir. 1963). However, reliance on that case is totally misplaced. The second circuit was concerned in *Miranda* with discrimination for reasons wholly unrelated to "union membership, loyalty, the acknowledgment of union authority, or the performance of union obligations." (326 F. 2d at 175) It is clear in the instant case that the intent and purpose of Local 16 in forcing the Bulletin not to hire the eight applicants was to encourage membership in Local 16. *See Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers v. NLRB*, 365 U. S. 667 (1961).

B. The Decision of the Board as Enforced by the Third Circuit Court of Appeals Found Clearly That the Union's Activities Were Unfair Labor Practices Rather Than Proper Union Functions.

Contrary to the allegations of the petitioner, the Court of Appeals for the Third Circuit, in enforcing the Board's order as modified, did not take the position that any union or employer practice which encourages union activity and membership is a per se violation of the Act; the Board and the court simply held that Local 16's activities in forcing the Bulletin to refuse to hire the applicants because they lacked membership in and were not initially approved or cleared by Local 16 violated the National Labor Relations Act. Furthermore, the Board, in adopting the Trial Examiner's decision, considered at length Local 16's alleged justifications for its actions and totally rejected the assertions that they constituted legitimate or legal justifications.

The suggestions by Local 16 in its petition for writ of certiorari that the Bulletin failed to live up to its obligations in policing its place of work and its work force or that the Bulletin made no effort to control its own plant and work force are not only unsupported by, but are directly contrary to the evidence. While both the National Labor

Relations Board and the Court of Appeals for the Third Circuit adopted almost all of the Trial Examiner's decision without comment, both the Board and the Court of Appeals apparently felt compelled to recite at length the activities of Local 16 and its members with respect to the incidents of sabotage, slowdowns and harassment which occurred when the Bulletin attempted to hire the applicants. It was because of these activities on the part of Local 16 and the extended effort by the Bulletin to overcome Local 16's adamant and violent opposition to the hiring of the eight applicants, that the Board, with the approval of the Court of Appeals, held that Local 16 should be primarily liable for any backpay due the applicants.

The Board stated in its decision and order:

> "The facts show that the Company made repeated attempts to persuade the Union that the ex-Curtis pressmen were qualified and that a negotiated solution was the preferable one. The Union responded with assertions of its 'exclusive' control over hiring, warnings of 'trouble,' and the statement that the eight applicants would be hired only under a court order. Following a crippling slowdown in the pressroom (which upset a Board settlement agrement), the Company itself filed charges against the Union. And the Union persisted in its unlawful pressures against the hiring of the ex-Curtis employees. In light of the Union's intransigent attitude and the Company's vulnerability to union pressure, we cannot say, for remedy purposes herein, that the Company should be faulted for not having done more than it did to resist the Union's coercive and discriminatory conduct. Rather, we are satisfied that, under the circumstances presented, the Company took all reasonable measures required to overcome the Union's opposition to the hiring of the eight applicants,

and that the primary burden for restoring the wage losses resulting from the discrimination rightfully falls upon the Union." (181 N.L.R.B. No. 95 at 2-3) (footnote omitted)

In finding that the Board's order holding Local 16 primarily liable for the backpay to be "just and warranted" the Court of Appeals pointed out that it would be "patently inequitable that the employer be more than secondarily responsible for back pay." (443 F. 2d at 865). See also *NLRB v. Lexington Electric Products Co.*, 283 F. 2d 54 (3d Cir. 1960), *cert. denied*, 365 U. S. 845 (1961).

The evidence is strong, clear and convincing, as found by the Trial Examiner, the Board and the Court of Appeals, that the purpose, intent and effect of Local 16's actions was to illegally condition employment at the Bulletin upon membership in or clearance or approval by Local 16.

CONCLUSION.

For the foregoing reasons the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-552

PHILADELPHIA NEWSPAPER PRINTING PRESSMEN'S UNION LOCAL NO. 16, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,

AND

BULLETIN COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-23) is reported at 443 F. 2d 863. The Board's decision and order (A. 252-301, Pet. App. 24-27)[1] are reported at 181 NLRB No. 95.

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[1] "A." references are to the appendix filed by the parties in the court below.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1971, and a petition for rehearing was denied on July 27, 1971 (Pet. 2). The petition for a writ of certiorari was filed on October 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the union violated Section 8(b)(2) and (1)(A) of the National Labor Relations Act by causing the employer to deny employment to eight employees because they were neither members of the Union nor cleared for employment by it.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), are set forth at Pet App. 28-29.

STATEMENT

A. The Board's Findings of Fact

The Bulletin, a newspaper publisher in Philadelphia, Pennsylvania, is a member of the Newspaper Publishers Association of Philadelphia, which has a collective bargaining agreement with Local 16 of the Philadelphia Newspaper Printing Pressmen's Union covering journeymen, pressmen, apprentices, and junior pressmen or plate boys (A. 253; 54, 210-213).

The agreement provides, *inter alia*, that the Union will furnish the employer with "competent and skilled pressmen for the publisher's regular work force or extra work," and that the employer will be the judge of an applicant's "competency" (A. 253-254, 282; 79, 210).

A shortage of journeymen pressmen caused a dispute between the Bulletin and the Union as to the Bulletin's right to hire journeymen pressmen directly, rather than through the Union (A. 256-257; 67-70). After fruitless negotiations over the problem, the International Printing Pressmen's Union placed Local 16 under trusteeship for 18 months (A. 257; 69-70). The Union and the Publishers' Association then resolved the dispute by an agreement they called the "De Andrade Agreement," which provided that members of the Publishers' Association could hire directly journeymen pressmen who had not completed the International's apprenticeship correspondence course, but that their seniority would be less than that of "qualified" journeymen, *i.e.*, those who had completed the Union correspondence course (A. 257-258; 70, 92-94, 218-220).

For the next two years, the Bulletin did not hire any pressmen directly, but continued to hire those referred by Local 16 (A. 259; 84-85). The Union often could supply only apprentices who would have to be paid journeymen's rates or journeymen on their days off available only at premium rates (Tr. 62-63). In January 1969, however, the Curtis Publishing Company decided to discontinue publication of the Saturday Evening Post. Many laid-off Curtis pressmen, including Edward Henderson, applied to the

Bulletin for employment (A. 259; 9, 84-85). Bulletin Vice-President Spendlove advised Local 16's business manager, Jack Reilly, that it intended to hire Henderson, who had 20 years of experience with Curtis, and that it would follow the terms of the De Andrade Agreement (A. 260; 74). Reilly responded that the Bulletin had better not put Henderson to work "because it would cause trouble" (*ibid.*). Reilly discussed the matter with Local 16's executive committee, and then reported to Spendlove that "we have a real problem" because the executive committee believed that "the Union had the exclusive right to hire people." (A. 260, 77).

On January 17, Richard Cummings, a Curtis employee with 23 years of experience who was about to be laid off, went to Reilly, showed him his union card in the sister local organized at Curtis, and told him that he was interested in employment at the Bulletin (A. 262; 9-10). Reilly replied that Local 16 had 900 members and that he had to "protect his union membership," but that he would bring Cummings' request before the Local's executive committee (A. 262-263; 11). Two days later, Cummings filed an employment application with the Bulletin's personnel manager, who advised that she considered him a qualified pressman on the basis of his experience, that his application would be processed quickly, and that probably he would hear from her during the following week (A. 263; 11).

On January 27, Bulletin and Union representatives met in an effort to resolve the dispute over whether the newspaper could hire the ex-Curtis employees (A.

260-261; 77-78). Reilly asserted that the Union "had the exclusive right to hire" employees for the Bulletin pressroom. Spendlove, however, pointed out that the agreement did not convey that right, and that if such were the case there would have been no need for the De Andrade agreement (A. 261; 78). When Reilly claimed that the Curtis applicants were not qualified, Spendlove noted that the agreement makes the employer the sole judge of competency. He added that the applicants, who had 20 years of experience, were not only qualified, but were certainly more qualified than the inexperienced apprentices that the Bulletin was required to use as journeymen because of the shortage of skilled craftsmen (A. 261; 79, 210). The meeting ended with Reilly stating that the Union would supply the Bulletin with men, and that it "couldn't care less" about the men whose applications had been received (A. 261; 79).

On February 13, Local 16 met with the Publishers' Association. Spendlove produced a list of eight former Curtis employees who had applied to the Bulletin for employment, and again urged Local 16 to cooperate. Reilly and Local 16 President Mallon again stated that the Union had the exclusive right to hire, and that Bulletin "hiring should be done only on referral by the Union." Mallon further stated that the applicants would work "only under a court order" (A. 262; 83, 101-102).

On February 14, Cummings learned that Local 16's executive committee had tabled the question of what to do about ex-Curtis employees seeking Bulletin employment, and thereupon filed unfair labor practice

charges with the Board against both the Company and the Union (A. 262; 12-13; 193-194). He then went back to the Bulletin, but was not hired because the Company feared there would be a production slowdown if he was hired without union clearance (A. 262; 14). In March, the Union asked Cummings to drop the charges, process the case "through union channels," and place his traveling card with local 16 (A. 263; 15-17). On April 11, Reilly invited Cummings to attend a Local 16 executive committee meeting, at which Reilly asserted that Cummings was a qualified applicant because no one who has worked in the pressroom for 23 years is unqualified. Reilly added that, although Cummings' traveling card was tabled "because everything was frozen" until the International officials arrived in Philadelphia the following week, he would have no trouble at the Bulletin, if he was hired, so long as he cooperated (A. 264; 18-20).

On April 30, the Bulletin entered into a settlement, approved by the Board's Regional Director, in which the Company agreed to offer employment as journeymen pressmen to the eight named former Curtis employees and to post appropriate notices (A. 264; 86, 227-228). Thereafter, the Bulletin sent letters to the eight applicants offering them employment; six responded, and were interviewed and hired (A. 265; 20-22, 87, 125-126, 135). On May 20, the Company's production manager met with the pressroom foremen and explained the terms and significance of the settlement agreement. He also told the Union's chapel chairman that the required notices would be posted, and they were later that day (A. 265; 87-88, 126-128).

Following the posting of the notices, the Bulletin experienced production problems, which resulted in part from electrical switches being in improper positions, damage to the photo-electric cells controlling the movement of the reels, and the removal of contacts from the control board of reels (A. 265; 88-89, 121-124, 129-131). Assistant Business Manager Elliott complained to Reilly, who professed to know nothing about the problem. He said he would look into the matter, adding that "the union was concerned about the Curtis people" (A. 266; 105). Reilly also stated that he understood the Bulletin, in explaining the settlement agreement to its foremen, had instructed them to teach Curtis employees how to do the work. He warned that Local 16 would not permit foremen to assist the new employees, that they would have to prove their competence, and that the union members had been so instructed (A. 266; 105-107).

When production continued to fall, Spendlove instructed Production Manager Grant to take the Board notices down, and notify the Curtis employees not to report for work (A. 267; 89, 109). Grant carried out these instructions, informed the chapel chairman of his action, and asked him to get the men back to work (A. 267; 136). The chapel chairman returned later and told Grant that "the word had been passed" (A. 267-268; 136-137). There was an upswing in production for the rest of the day, and the following day the presses operated normally (*ibid.*).[2]

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[2] Assistant Business Manager Elliott later told Reilly that the notices had been taken down and the Curtis men instructed not to report, and asked whether this would resolve the problem

On May 26, the Bulletin notified the Board's Regional Director that, because of the "conduct on the part of members of * * * Local 16," the Bulletin found it impossible to comply with the settlement agreement (A. 268; 89-90, 229). The Regional Director withdrew his approval of the agreement, issued a consolidated complaint against both the Union and the Company, and petitioned the United States District Court for the Eastern District of Pennsylvania for an injunction against them, pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j). On August 18, the Company and the Union entered into a stipulation whereby the Bulletin agreed to offer employment to the eight former Curtis employees, and the Union agreed it would not conduct any stoppages or slowdowns if they were hired (A. 268; 195-205, 230, 268).

On August 27, pursuant to the agreement, Cummings and Frank Roberts reported to work as pressmen (A. 268; 23, 138). From the beginning of their employment, they were subject to constant harassment from members of Local 16 who refused to give them assistance, stood around in groups staring at them while they worked, pelted them with objects, called them names, and splashed ink on their presses, in their clothes lockers, and on Cummings himself (A. 269; 24-30). The same conduct continued during the following week, and, on September 2, when two additional Curtis employees reported for work,

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(A. 268; 109). Reilly again professed no knowledge, but added that, if the Bulletin did have a problem, such action would resolve it (A. 268; 109).

all four employees were pelted with objects and subjected to ink pouring and other harassment (A. 269; 29). When Elliott told Reilly what was happening, Reilly responded that the Union was a highly responsible organization and that the Bulletin's troubles were of its own making (A. 270; 110-112). When Elliott added that the Bulletin would dismiss anyone caught in the act of sabotage or harassment, Reilly replied that, if it did, "there will be trouble" (*ibid.*).

Harassment continued (A. 270; 145-148, 158-159). The Union made no attempt to stop it (A. 296; 30). One of the four employees quit, and the rest were sent home at lunch time for their own protection, and have not been scheduled for work since (A. 270; 30-31, 75, 148-149).

B. The Decisions Below

Based on the foregoing facts, the Board concluded that the Union was responsible for causing the Bulletin to refuse to hire and to keep in its employ the eight former Curtis employees; that its motive in doing so was not because these employees were unqualified, but because they were not members of, or cleared and approved for employment by, the Union; and that the Union thereby violated Section 8(b)(2) and (1)(A) of the Act (A. 274-286; Pet. App. 24).[3] The Board, *inter alia*, ordered the Union to cease and desist from the unfair labor practices found, and made

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[3] The Board found that the Company, in turn, violated Section 8(a)(3) and (1) of the Act by acquiescing in the Union's demands (A. 286-287; Pet. App. 24). The validity of the findings against the Company is not in issue here

the Union "primarily liable," for back pay (A. 294-295; Pet. App. 26-27).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 17-23).

ARGUMENT

The petition rests on the premise that the court of appeals held that the Union violated Section 8(b)(2) and (1)(A) of the Act[4] without first determining that the Union was motivated by an intention to encourage union membership, rather than various beneficial motives which are suggested (Pet. 8-15). The Board, however, found that the Union caused the Company to deny employment to ex-Curtiss employees, not because they were unqualified or for any other legitimate reason, but solely because they were not members of the Union and had not been cleared for employment by it (A. 281, 284-285). The court of appeals correctly concluded that the Board's findings were "amply supported by the evidence" (Pet. App. 19). Accordingly, even assuming that specific proof of an intent to encourage union membership was required with respect to the blatant form of dis-

[4] Section 8(b)(2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)." Section 8(a)(3), in turn, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization." Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7."

crimination which occurred here (see *Radio Officers* v. *National Labor Relations Board*, 347 U. S. 17, 44-45), there was such proof.

The only question really presented, therefore, is whether the court below correctly concluded that the Board's findings of Union responsibility and unlawful motivation were adequately supported by the record. Such an evidentiary issue does not warrant review by this Court. In any event, the facts summarized above show that there is ample support for the Board's findings.[5]

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[5] The Board's modifications of the standard remedy, making the Union primarily liable for backpay, was well within its discretion in such matters. See *National Labor Relations Board* v. *Lexington Electric Products Co.*, 283 F. 2d 54, 57 (C.A. 3), certiorari denied, 365 U.S. 845; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 184-185; *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 540.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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